The State Government of Sabah v Sipadan Dive Centre Sdn Bhd & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO S-01–742 OF 2010
MOHD HISHAMUDIN, AZAHAR MOHAMED AND BALIA YUSOF JJCA
14 JANUARY 2013

Land Law — Licence — Occupation of Island reserved as bird sanctuary — State land — Whether respondents were entitled to rely on principle of legitimate expectation to file present claim against appellant — Whether there was breach of legitimate expectation — Whether respondents presence on island was illegal — Whether appellant had acquiesced to presence of respondents on land — Whether respondents had implied licence to operate as diving operators on island — Whether respondents were given sufficient notice to vacate land

Sipadan Island ('the island') apart from being declared under s 28 of the Sabah Land Ordinance ('the Land Ordinance') as a bird sanctuary was also a protected area under the Protected Areas and Protected Places Act 1959 ('PAPPA'), with all movement on the island to be brought under the control of the Biro Keselamatan Negara ('BKN'). The first to third respondents were companies that were operating resorts with full board and lodging that provided diving facilities on the island since the 1990s. Sometime in November 1997, the three respondents together with other diving operators on the island incorporated the fourth respondent to liaise with BKN and to handle all matters related to diving activities on the island. In meetings with the respondents, BKN had directed the former to come up with proposals to address the future of diving operations and conservation on the island. Accordingly the respondents had prepared two proposals to address these matters. However, on 26 March 2004, the Deputy State Secretary's office issued a notice to all the diving operators on the island to demolish all structures or buildings on the island and vacate the island on or before 31 December 2004 on the grounds that Malaysia had to fulfill its international obligations following the decision of the International Court of Justice ('ICJ') on the ownership of the island. When the respondents sought clarification the appellant issued a letter citing conservation matters as reasons for issuing the directive to the six diving operators to vacate the island. By 1 January 2005, the respondents had ceased all operations on the island and started dismantling the buildings for removal. Thereafter the respondents had requested for and obtained an extension of time for the demolition and removal of buildings and structure materials from the island. Despite the said extension, the respondents had not completed the demolition as directed and their buildings and structures were subsequently demolished and removed by

BKN. The respondents then commenced a suit against the appellant for breach of legitimate expectation and in the tort of trespass to goods and property. By way of this suit the respondents had claimed damages arising from the wrongful demolition of their buildings in their diving resorts on the island. The appellant had submitted that with effect from 1 February 1933 all rights prior or title on the island were extinguished and that the island could not be used for any other purpose other than as a bird sanctuary. Based on the circumstances of this case, the trial judge had held that there was a breach of legitimate expectation, in that the plaintiffs were not given reasonable notice to wind down their business. The trial judge thus allowed the respondents' claim for damages, to be assessed by the Registrar, for breach of legitimate expectation. This was the appellant's appeal against that decision.

Held, allowing the appeal with costs of RM60,000:

(1) Upon examining the pleadings it was found that the respondents' claim of legitimate expectation was not only vague but also multiple in nature. In fact, the trial judge, who ruled in favour of the respondents, was not able to state in clear in terms the nature of the legitimate expectation breached by the appellant. Clearly, nowhere in his grounds of judgment had the trial judge ruled that the respondents had on the facts and evidence established the legitimate expectation that they would be consulted by the appellant on any issue on the operation of the island as a tourism spot or that they would be given 'reasonable notice to wind down their business' on the island (see paras 11–14).

(2) In any case the respondents' reliance on the principles of acquiescence and legitimate expectation to found a cause of action against the appellant was misconceived. The island as a whole was state land that had been reserved by the Land Ordinance as a bird sanctuary. Therefore, the respondents' presence on the land was strictly not in accordance with the Land Ordinance. As such, the respondents could not claim to have any interest on the land (see para 21).

(3) Under the Land Ordinance, occupation of state land could only be by way of alienation or by way of temporary occupation licence (TOL). In the present case, the respondents had been on the island since the 1990s but they had neither applied for any TOL nor been issued with any. In the circumstances, any attempt to recognise the principle of acquiescence or principle of implied licence by conduct of the appellant would be creating a dangerous precedent. In dealing with state land the appellant should conduct its affairs in accordance within the framework, principles and provisions of the Land Ordinance (see para 23).

(4) The respondents could not claim to any 'legal immunity' or to any proprietary right or interest, regarding their unlawful conduct on the island, vis-à-vis the Land Ordinance just because their activities on the

island were condoned by the appellant and the collector. The collector, the appellant and the respondents were all under a legal and moral duty to uphold the law; all the more so the collector and the appellant, the guardians of the law and custodians of state land. However, to be fair to the appellant, it and BKN had given notices to the respondents to vacate since 24 September 2003. Thus, even if the appellant had given the respondents an implied licence to occupy the island that licence had been revoked as from 24 September 2003 (see para 24).

(5) With regard to the issue of reasonable notice, since the respondents knew or ought to have known that their presence on the island was illegal, they were not entitled to reasonable notice. Even if the respondents were entitled to notice, they were not entitled to a length of time as if they were implied licensees on the island because the island was reserved as a bird sanctuary and also protected under the PAPPA. Further, the demolition of the respondents' buildings on the island was by the BKN, an agency of the Federal Government enforcing a Federal Legislation. In any case, based on the agreed facts, the respondents had been given ample notice by the collector, the appellant and BKN to dismantle their buildings and structures (see para 27).

[Bahasa Malaysia summary

Pulau Sipadan ('pulau tersebut') selain daripada diisytiharkan di bawah s 28 Ordinan Tanah Sabah ('Ordinan Tanah') sebagai kawasan perlindungan burung juga merupakan kawasan perlindungan di bawah Akta Kawasan Perlindungan dan Tempat Perlindungan 1959 ('AKPTP'), yang mana semua pergerakan ke atas pulau tersebut di bawah kawalan Biro Keselamatan Negara ('BKN'). Responden-responden pertama hingga ketiga adalah syarikat-syarikat yang menjalankan operasi tempat-tempat peranginan dengan tempat rehat dan penginapan lengkap yang menyediakan kemudahan untuk menyelam di pulau tersebut sejak tahun 1990an. Sekitar bulan November 1997, ketiga-tiga responden bersama operator penyelam lain di pulau tersebut telah memperbadankan responden keempat untuk berhubungan dengan BKN dan mengendalikan semua perkara berkaitan kegiatan menyelam di pulau tersebut. Dalam mesyuarat-mesyuarat dengan responden-responden, BKN telah mengarahkan mereka mengemukakan cadangan untuk mengutarakan operasi menyelam masa hadapan dan pemuliharaan pulau tersebut. Sehubungan itu responden-responden telah menyediakan dua cadangan untuk mengutarakan perkara-perkara tersebut. Walau bagaimanapun, pada 26 Mac 2004, pejabat Timbalan Setiausaha Negeri telah mengeluarkan notis kepada semua operator menyelam di pulau tersebut untuk merobohkan semua struktur atau bangunan atas pulau tersebut dan mengosongkan pulau tersebut pada atau sebelum 31 Disember 2004 atas alasan bahawa Malaysia perlu memenuhi obligasi antarabangsa mengikut keputusan Mahkamah Keadilan Antarabangsa ('MKA') berhubung milikan pulau tersebut. Apabila

responden-responden memohon penjelasan perayu telah mengeluarkan surat memetik perkara-perkara pemuliharaan sebagai sebab-sebab untuk mengeluarkan arahan kepada enam operator selam mengosongkan pulau tersebut. Menjelang 1 Januari 2005, responden-responden telah menghentikan semua operasi di pulau tersebut dan mula merobohkan bangunan untuk dialihkan. Selepas itu responden-responden telah memohon untuk dan memperoleh lanjutan masa untuk meroboh dan mengalih bangunan dan bahan struktur daripada pulau tersebut. Walaupun dalam tempoh lanjutan itu, responden-responden tidak dapat menyelesaikan kerja meroboh itu sebagaimana diarahkan dan bangunan dan struktur mereka akhirnya telah dirobohkan dan dialihkan oleh BKN. Responden-responden kemudian telah memulakan guaman terhadap perayu kerana pelanggaran jangkaan sah dan dalam tort kerana pencerobohan terhadap barangan dan hartanah. Melalui guaman ini reponden-responden menuntut ganti rugi yang timbul daripada robohan secara salah terhadap bangunan mereka di tempat peranginan menyelam mereka di pulau tersebut. Perayu berhujah bahawa mulai 1 Februari 1933 semua hak sebelum atau hak milik atas pulau tersebut telah dihapuskan dan bahawa pulau tersebut tidak boleh digunakan untuk apa-apa tujuan lain selain kawasan perlindungan burung. Berdasarkan keadaan kes ini, hakim perbicaraan telah memutuskan bahawa terdapat pelanggaran jangkaan sah, di mana plaintif-plaintif tidak diberikan notis munasabah untuk memberhentikan perniagaan mereka. Hakim perbicaraan dengan itu membenarkan tuntutan responden-responden untuk ganti rugi, yang perlu ditaksirkan oleh pendaftar, kerana pelanggaran jangkaan sah. Ini adalah rayuan perayu terhadap keputusan tersebut.

Diputuskan, membenarkan rayuan dengan kos RM60,000:

(1) Setelah memeriksa pliding adalah didapati bahawa tuntutan jangkaan sah respoden-responden bukan sahaja tidak jelas tetapi juga bersifat bertindan. Bahkan, hakim perbicaraan, yang memutuskan menyebelahi responden-responden, tidak dapat menyatakan dengan jelas terma-terma berhubung cara jangkaan sah dilanggari oleh perayu. Adalah jelas, tiada dalam alasan penghakiman beliau yang mana hakim perbicaraan itu telah memutuskan bahawa responden-responden telah atau fakta dan keterangan membuktikan jangkaan sah yang mereka akan dinasihati oleh perayu berhubung apa-apa isu tentang operasi di pulau tersebut sebagai pusat pelancongan atau bahawa mereka akan diberikan 'reasonable notice to wind down their business' di pulau tersebut (lihat perenggan 11–14).

(2) Dalam apa keadaan pun kebergantungan responden-responden atas prinsip-prinsip persetujuan dan jangkaan sah untuk membuktikan kausa tindakan terhadap perayu telah disalah tanggap. Pulau tersebut secara keseluruhan adalah tanah kerajaan negeri yang telah dirizab oleh Ordinan Tanah sebagai kawasan perlindungan burung. Oleh itu,

kehadiran responden-responden di pulau tersebut dengan jelas tidak menurut Ordinan Tanah tersebut. Dengan itu, responden-responden tidak boleh menuntut mempunyai apa-apa kepentingan ke atas pulau tersebut (lihat perenggan 21).

(3) Di bawah Ordinan Tanah tersebut, penghunian atas tanah kerajaan negeri hanya boleh melalui pemberian milik atau melalui lesen penghunian sementara ('TOL'). Dalam kes ini, responden-responden telah berada atas pulau tersebut sejak tahun 1990an tetapi mereka tidak pernah memohon apa-apa TOL atau diberikan yang sama. Dalam keadaan berikut, apa-apa percubaan untuk mengiktiraf prinsip-prinsip pesetujuan atau prinsip lesen tersirat melalui perbuatan perayu akan membentuk duluan yang bahaya. Dalam mengendalikan tanah kerajaan negeri perayu patut melaksanakan urusannya menurut kerangka prinsip-prinsip dan peruntukan-peruntukan Ordinan Tanah tersebut (lihat perenggan 23).

(4) Responden-responden tidak boleh menuntut apa-apa 'legal immunity' atau terhadap apa-apa hak atau kepentingan hartanah, berhubung perbuatan menyalahi undang-undang mereka di pulau tersebut, vis-à-vis Ordinan Tanah tersebut hanya kerana kegiatan mereka di pulau tersebut telah dipersetujui oleh perayu dan pemungut. Pemungut, perayu dan responden-responden semuanya di bawah kewajipan sah dan moral untuk menegakkan undang-undang; lebih-lebih lagi pemungut dan perayu, pengawal-pengawal undang-undang dan penjaga-penjaga tanah kerajaan negeri. Walau bagaimanapun, untuk berlaku adil kepada perayu, ia dan BKN telah memberikan notis-notis kepada responden-responden untuk mengosongkan kawasan sejak 24 September 2003. Oleh itu, meskipun perayu telah memberikan responden-responden lesen tersirat untuk menghuni pulau tersebut lesen tersebut telahpun dibatalkan sejak 24 September 2003 (lihat perenggan 24).

(5) Berhubung isu notis yang munasabah, oleh kerana responden-responden mengetahui atau patut mengetahui kewujudan mereka atas pulau tersebut menyalahi undang-undang, mereka tidak berhak mendapat notis yang munasabah. Walaupun responden-responden berhak terhadap notis itu, mereka tidak berhak mendapat lanjutan masa sepertimana jika mereka merupakan pemegang-pemegang lesen tersirat ke atas pulau tersebut kerana pulau tersebut dirizab sebagai kawasan perlindungan burung dan juga dilindungi di bawah AKPTP. Bahkan, perobohan bangunan-bangunan responden-responden di pulau tersebut adalah oleh BKN, agensi Kerajaan Persekutuan yang menguatkuasakan perundangan persekutuan. Dalam apa keadaanpun, berdasarkan fakta-fakta yang dipersetujui, responden-responden telah memberikan

notis yang mencukupi oleh pemungut, perayu dan BKN untuk merobohkan bangunan-bangunan dan struktur-struktur mereka (lihat perenggan 27).]

Notes

For a case on occupation of Island reserved as bird sanctuary, see 8(2) *Mallal's Digest* (4th Ed, 2013 Reissue) para 3750.

Cases referred to

Alfred Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor [1989] 2 MLJ 202, HC (not folld)
De Bussche v Alt (1878) 8 Ch D 286, CA (refd)
Glasson v Fuller [1922] SASR 148 (refd)
Haji Abdillah bin Haji Abdul Hamid v ACLR of Semporna and the State Government (T21–58– 2006) (unreported), HC (not folld)
Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan [1999] 3 MLJ 1, FC (refd)

Legislation referred to

Protected Areas and Protected Places Act 1959
Sabah Land Ordinance ss 5, 9, 18, 28, 48

Appeal From: Civil Suit No SK 22–446 of 2007 (High Court, Kota Kinabalu)

Roderic Fernandez (Zaleha Rose Pandin and Dayangku Fazidah Hatun Pg Bagul with him) (State Attorney General of Sabah) for the appellant.
Alex Decenia (Shireen Sikayun with him) (Lee & Thong) for the respondents.

Mohd Hishamudin JCA (delivering judgment of the court):

[1] In this appeal, on 28 September 2012, after hearing submissions, we reserved judgment.

[2] We now give our judgment.

[3] We are allowing the appeal with costs.

[4] The respondents'/plaintiffs' cause of action against the Sabah State Government ('the appellant/defendant') is for breach of legitimate expectation and the tort of trespass to goods and property.

[5] The agreed facts of the case are as set out in the grounds of judgment of the learned High Court judge. They are as follows:

(1) Sipadan Island has been reserved as a Bird Sanctuary under 28 of the Land Ordinance (Sabah Cap 68) since 1933 by virtue of Gazette Notification No 69/1933;

(2) the first to fourth plaintiffs are companies duly incorporated in Malaysia, operating and running resorts with dive facilities complete with full board and lodging at their respective sites on Sipadan Island since 1990s until 1 January 2005;

(3) the defendant had as early as 1992 directed the operators to stop erecting further building and structure on the island;

(4) on 6 October 1994, the first plaintiff wrote a letter to Datuk Tham Nyip Shen the then Minister of Tourism and Environmental Development in his personal capacity, in respect of the position of the operators on the island;

(5) on 10 February 1995, the defendant issued a show cause letter to the second plaintiff informing the second plaintiff that its buildings were erected and/or constructed on a reserved state land and were given 14 days to response thereof;

(6) on 24 September 1997, the island was declared as a protected area under the Protected Areas and Protected Places Act 1959 and therefore all movement and conduct on the island since then are under the control of Biro Keselamatan Negara ('BKN');

(7) in compliance with a directive from BKN through its letter dated 8 November 1997, the first and fourth plaintiffs together with Borneo Divers & Sea Sports (Sabah) Sdn Bhd and Pulau Sipadan Resort & Tours Sdn Bhd incorporated the fifth plaintiff to handle all matters related to the dive activities with BKN on behalf of the six dive operators on Sipadan Island;

(8) since 1997, the first and fourth plaintiffs including Borneo Divers & Sea Sports (Sabah) Sdn Bhd and Pulau Sipadan Resort & Tours Sdn Bhd have been dealing with BKN in all matters pertaining to the number of divers/tourists and workers staying on the island including the number of structures/buildings that could be set up/remained;

(9) by a letter dated 16 May 1998, BKN informed the fifth plaintiff and others directing that divers/tourists as well as workers gradually be reduced according to requirements stated in the letter;

(10) by a letter dated 12 November 1998, the BKN sought the first and fourth plaintiffs' cooperation in providing information on the plaintiffs' activities and investments on the island. This information was sought in preparation on Malaysia's claim on the sovereignty of Sipadan Island at the International Courts of Justice ('ICJ'). The plaintiffs complied and listed their respective involvement as follows:

(a) Sipadan Dive Centre RM1,655,030;

(b) Borneo Sea Adventures Sdn Bhd RM1,040,000;

(c) Syarikat Ramai Benar Sdn Bhd RM1,580,000; and

(d) Pulau Bajau Sdn Bhd RM1,500,000

BKN did not dispute these figures.

(11) with effect from 1 February 1999, the number of divers/tourists staying overnight was reduced from an average of 140 to 80 and the number of workers on the island was reduced from 180 to 23 on the directive of BKN. Some buildings were demolished on the instructions of BKN as the BKN had allocated only 14 divers/tourists for each resort;

(12) on one of the meetings with BKN, BKN had directed the first to fourth plaintiffs including Borneo Divers & Sea Sports (Sabah) Sdn Bhd and Pulau Sipadan Resort & Tours Sdn Bhd to come up with proposals to address the question of the future of diving operations on the island and conservation thereof;

(13) accordingly, the fifth plaintiff had prepared a proposal titled 'Proposed Master Planning and Redevelopment of Pulau Sipadan, Borneo' (28 June 1999) for BKN's consideration and comments. On the fifth plaintiffs initiative a second proposal titled: 'Eco-Tourism Management Plan — Summary, Sipadan Island' was prepared by them and submitted to the Ministry of Tourism for its consideration. The second proposal deals with various conservation matters affecting the island;

(14) BKN and the first to fourth plaintiffs including Borneo Divers & Sea Sports (Sabah) Sdn Bhd and Pulau Sipadan Resort & Tours Sdn Bhd have engaged in many meetings to discuss security, number of divers/tourists and workers who will be allowed to stay overnight on the island, conservation aspects and structures/buildings on the island;

(15) on 24 September 2003, the Ministry of Tourism, Culture and Environment held a meeting which was attended by the six operators. The six operators were informed as follows:

2. Perkara-perkara yang berbangkit

2.1 Kawalselia Pembangunan dan Pelancongan Pulau Sipadan dan Pulau Ligitan

2.1.1 Berikutan dengan keputusan International Court of Justice (ICJ) berkenaan dengan Pulau Sipadan, maka Negara Malaysia mestilah mematuhi keputusan tersebut dari segi 'international obligation'. Selaras dengan itu, Jemaah Menteri Kerajaan Pusat telah membuat keputusan supaya kawalselia pembangunan dan pelancongan Pulau Sipadan dan Pulau Ligitan diletakkan di bawah Jawatankuasa Bersama antara Kerajaan Persekutuan dan Kerajaan Negeri.

Walaupun demikian Pulau Sipadan masih di bawah kawalan badan Keselamatan Negara dan mengikut arahan, sepatutnya Pulau Sipadan dikosongkan dengan serta merta selepas keputusan ICJ dalam tempoh 3 (tiga) bulan berkuatkuasa mulai 1 Disember 2003. Akan tetapi Kerajaan Negeri telah mengambil kira kepentingan operator-operator pelancongan yang beroperasi di Pulau Sipadan dan memberi masa sebelum hujung tahun 2004 untuk mereka mengosongkan pulau tersebut.

Berlanjutan dengan itu operator-operator pelancongan yang beroperasi di Pulau Sipadan dinasihatkan agar tidak menerima apa-apa tempahan selepas hujung tahun 2004. Tindakan ini diambil bagi membolehkan operator-operator pelancongan mengosongkan pulau tersebut kerana hanya aktiviti-aktiviti menyelam sahaja yang boleh dijalankan tanpa tinggal di pulau berkenaan.

2.1.2 Pejabat Timbalan Setiausaha Kerajaan Negeri akan mengeluarkan surat berkenaan dengan arahan ini kepada operator-operator pelancongan.

2.2 Komen Dan Operator-Operator Pelancongan.

Operator-operator Pelancongan yang beroperasi di Pulau Sipadan pada masa ini memohon agar mereka diberi tempoh bagi membolehkan mereka berkenaan dengan arahan untuk mengosongkan Pulau Sipadan memandangkan mereka mempunyai komitmen terhadap tempahan dari pengguna luar negara bagi tahun 2004.

Operator-operator Pelancongan akan memaklumkan kepada Pejabat TSKN (P) hasil dari perbincangan mereka.

(16) on 5 January 2004, the first plaintiff, Sipadan Dive Centre Sdn Bhd wrote to Datuk Monica Chia, the then Permanent Secretary of the Ministry of Tourism, Culture and Environmental Development disputing the accuracy of minutes 2.2 above and asking the government do inform the plaintiffs of the government's stand and policy in writing;

(17) on 26 March 2004, a notice issued by the deputy state secretary's office to all six operators to demolish all structures/buildings on the island and vacate. The operators were given until 31 December 2004. This directive was on the ground that Malaysia has to fulfill its international obligations following the decision of the International Court of Justice on the ownership of Sipadan Island;

(18) by a letter dated 2 April 2004, the first plaintiff wrote to the defendant requesting clarification on 'Malaysia's International obligations';

(19) in reply to the first plaintiff's letter dated 2 April 2004, the defendant issued another letter dated 19 April 2004 citing conservation matters as reason for issuing the directive to vacate the island;

(20) on 26 May 2004, another notice was issued by the Assistant Collector of Land Revenue, Semporna to the six operators informing them to demolish all buildings and structures belonging to them and to vacate the island on or before 31 December 2004,

(21) at a meeting requested by the operators held on 24 December 2004 with BKN and subsequently confirmed by a letter dated 27 December 2004, the BKN informed all operators that the demolition and removal exercise of the structures shall commence on the 1–21 January 2005 that is three weeks;

(22) by 1 January 2005, the first–fourth plaintiffs ceased all operations on the island and begun dismantling the buildings and removed all that could be removed.

On 15 January 2005, the BKN faxed over to the first plaintiff a letter dated 14 January 2005 informing the first plaintiff that they have no objection for them to be on the island to 'menjaga harga benda Syarikat dan kerja-kerja pemunggahan'. This approval is only for the period from 1–21 January 2005;

(23) on 20 January 2005, a meeting was held between representatives of the plaintiffs and senior government officers including officers from BKN at the state attorney general chambers and chaired by the Deputy State Secretary Datuk Awang Hj Samat where the operators requested for a lease of two months. However the plaintiffs were informed that due to security reasons every structure on Sipadan Island belonging to the plaintiffs must be demolished by 21 January 2005.

On the same day, Messrs Lee & Thong wrote to Messrs CJ Liew & Co expressing the plaintiffs' view on the said meeting. Messrs CJ Liew & Co then wrote a letter addressed to Datuk Awang Hj Samat enclosing the letter from Messrs Lee & Thong;

(24) on 5 February 2005, pursuant to the decision of *Jawatankuasa* the state secretary issued a notice giving further extension of time until 28 February 2005 to the six operators to demolish the buildings and structures on the island. Failure to do so, the demolition and removal of the buildings and structures materials will be carried out by the government and the expenses incurred will be borne by the operators; and

(25) despite the said extension, the first–fourth plaintiffs did not complete the demolition as directed vide the notices. These buildings and structures were subsequently demolished and removed by BKN.

[6] On 19 October 2010 the learned High Court judge of Kota Kinabalu allowed the respondents' claim against the appellant/defendant.

[7] The order of the High Court reads:

IT IS THIS DAY ORDERED that:-

1. Damages to be assessed by the Registrar for breach of legitimate expectation — ie failure to give a reasonable notice to wind down the business of the 1st, 2nd, 4th and 5th Plaintiffs;
2. Damages to be assessed by the Registrar for loss of buildings in view of the failure to give adequate notice to dismantle;
3. Interest at the rate of 8% per annum on the assessed amounts from the date of this judgment to full settlement of the same;
4. Costs to be taxed unless agreed to the Plaintiffs.

[8] For the purpose of this appeal, we consider the first issue as being whether the respondents are entitled to rely on the principle of legitimate expectation to claim the existence of a cause of action against the State Government of Sabah for breach of legitimate expectation and the tort of trespass to goods and property.

[9] The principle of substantive legitimate expectation is rooted in the concept of fairness. As a matter of law, a legitimate expectation arises when there is clear and unambiguous representation made by a public authority. The principle of legitimate expectation was discussed and applied by our Federal Court in *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan* [1999] 3 MLJ 1.

[10] The learned trial judge, in ruling that there was a breach of legitimate expectation, appears to a large extent to rely on the evidence of one of the respondents' witnesses, namely, one Datuk Wilfred Lingham ('PW1'), the Permanent Secretary of the State Ministry of Tourism & Environmental Development at the material time, on the issue of acquiescence. This is what PW1 in his evidence said (this part of the evidence of PW1 is quoted by the learned trial judge in his grounds of judgment):

> Q9 : As far as you are personally aware, did the State Government acquiesce to the presence of these dive resort operators on the island?
>
> A: Yes, the State Government was aware of the Dive Resort Operators on the island and have acquiesced to their presence. (Please refer to Page 8 Line 3 NOP).
>
> Q10 :Can you recall the agreement entered between Borneo Divers, Pulau Sipadan Resort and Sipadan Dive Centre with the turtle egg collectors on Sipadan Island?
>
> A: Yes.
>
> Q11 :Why were the agreements entered?
>
> A: For conservation reasons. The egg collectors have been collecting turtle eggs since time immemorial. It was feared that if this practice continues, the turtles may become extinct. It was a win-win situation whereby the egg collectors would get paid for the eggs and these eggs will be allowed to be hatched on the island.
>
> The agreements were signed at the Ministry of Tourism and witnessed by the then Minister, Dafu/c Tan Kit Sher,' (please refer to Page 8 Line 6 to 16 NOP).
>
> …
>
> Q18 :Was there a tacit recognition by the State Government on the presence of these operators on the island?
>
> A: Yes. Though there is no official confirmation to that effect.

Q19 : Why is this so?

A: It was a sensitive issue because of the claim by Indonesia that Sipadan island belonged to them. When Datuk Pairin Kitingan was the Chief Minister of Sabah I was verbally instructed by him to ensure that the Native Customary rights on the island and the right of the traditional egg collectors to collect turtle eggs were to be respected and protected and to remain intact. I was also to ensure that there would be minimal disturbance and damage to the environment and conservation measures on a sustainable basis had to be enforced. Meanwhile I was to allow the presence of the resort operators on the island.

Q20 : To your knowledge as the then Permanent Secretary to the Ministry of Tourism why didn't the State Authorities force the Operators to vacate the island leaving no operator there except for the Wildlife Department staff?

A: There was a fear that once all the operators leave the island, there would be a vacuum, others may come in forcibly and occupy the island. Presence of the foreign guests on the island was important to Malaysia. Further we feared that the local fishermen may come and 'bomb' the area, thus destroying the marine life and rich coral habitats there as the Wildlife Department did not have adequate manpower and resources. (Please refer to Page 10 to 11 NOP).

[11] Now, in our judgment, to begin with, upon examining the pleadings, we consider the claim of 'legitimate expectation' of the plaintiffs to be rather vague in nature. What, precisely, is the nature of that 'legitimate expectation' that the respondents are claiming and the State Government of Sabah is alleged to have breached? The vagueness of the plaintiffs' claim of legitimate expectation is apparent if we were to examine closely para 14 of the statement of claim. This paragraph reads:

14. When the fifth plaintiff prepared and submitted the two proposals to the defendant through BKN, the first, second, third, fourth and fifth plaintiffs had and still have the legitimate expectations as follows:—

(i) Due to the fact that the first, second, third and fourth plaintiffs have been established for some time on the island and have contributed to the diving and tourism industry in Sabah and Malaysia, the defendant would consult the first, second, third, fourth and fifth plaintiffs regarding sustainable conservation of Pulau Sipadan in the context of diving operations on the island.

(ii) The defendant through BKN and the Ministry of Tourism, whose acts were the acts of the defendant, would, upon receiving the two proposals prepared by the fifth plaintiff, consider them, call for meetings to discuss if necessary any amendments and counter proposals until all parties concerned agree on the necessary steps to be taken to achieve sustainable conservation on Sipadan Island.

(iii) Upon reaching agreement between the parties as aforesaid, the defendant

would allow the first, second, third and fourth and or the fifth plaintiffs to continue diving operations on the island consistent with sustainable conservation.

(iv) As the first, second, third and fourth plaintiffs had substantial investments on the island and contributed to the diving and tourism industry in Sabah and Malaysia, the defendant would not require them to leave the island without consulting them regarding the question of sustainable conservation on the island. Even if they were asked to leave after consultation the defendant would not subsequently allow other operators to operate on the island even if such operators were to comply with requirements of sustainable conservation on the island or build any structures and privatize the same to any other operators other than the fifth plaintiff if overnight stay were prohibited.

(v) Further the plaintiffs' legitimate expectations arose as a result of BKN's and or the defendant's implied representations as to the setting up of a consortium by the first, second, third and fourth plaintiffs including Borneo Divers & Sea Sports (Sabah) Sdn Bhd and Pulau Sipadan Resort & Tours Sdn Bhd and proposals by the fifth plaintiff for sustainable conservation on the island in the context of diving operations thereon.

(vi) Further and alternatively the plaintiffs' legitimate expectations arose following the defendant's, through the Minister of Tourism, recognition and acquiescence of the presence of the first, second, third and fourth plaintiffs including Borneo Divers & Sea Sports (Sabah) Sdn Bhd and Pulau Sipadan Resort & Tours Sdn Bhd on the island over the years and had encouraged the promotion of diving on Pulau Sipadan at various overseas shows. In consequence of the defendant's recognition and acquiescence as aforesaid the first, second, third and fourth plaintiffs have expended substantial sums of money on the promotion of the island and the development of the dive industry.

[12] Not only is the nature of the claim of legitimate expectation vague, it is also multiple in nature. Therefore, it is no surprise that the learned trial judge, notwithstanding the fact of having identified and narrowed down the respondents' claim on the issue of 'legitimate expectation' to be:

> [27] In the context of this case, it is undisputed that the fifth plaintiff was requested to prepare a master plan proposal for Pulau Sipadan and as such it is submitted that the defendant had created a legitimate expectation that the plaintiffs would be consulted on any issue on the operation of Pulau Sipadan as a tourism spot.

and

> [28] In respect of substantive expectation, the plaintiffs submit that the defendant had created the expectation that the plaintiffs would be allowed to continue operating on the island even after Malaysia had gained sovereignty over the Island.,

in spite of the vagueness and the 'multiple' nature of the legitimate expectation

claim, and, having ruled in favour of the respondents on the issue of legitimate expectation, yet was not able to state in clear terms what that legitimate expectation' was that was allegedly breached by the Sabah State Government, the appellant. For the learned trial judge merely states:

> [30] Applying those principles to the circumstances in this case, I have no hesitation in finding that the plaintiffs have acquired some sort of legitimate expectations and what that is depends on the circumstances herein stated.
>
> …
>
> [32] … Be that as it may, the reality now is that no corporate entity is stationed on Pulau Sipadan. That being the case, the plaintiffs' expectation that they be allowed to remain on Pulau Sipadan or given replacement area in nearby island cannot be sustained as they had not been discriminated against by the defendant.

[13] Clearly, nowhere in his grounds of judgment that the learned trial judge had ruled that the respondents had on the facts and evidence established the following legitimate expectation:

> … a legitimate expectation that the plaintiffs would be consulted on any issue on the operation of Pulau Sipadan as a tourism spot.

[14] Indeed, we will go further to say that there is nothing in the agreed facts to support any assertion that there was a clear and unambiguous representation by the State Government of Sabah that the respondents would be consulted on any issue on the operation of Pulau Sipadan as a tourism spot, or that the respondents would be given 'reasonable notice to wind down the business' (if one were to go by the strict wordings of the court's order) on the island.

[15] And, obviously, that part of the learned judge's judgment:

> The plaintiffs have acquired some sort of legitimate expectations and what that is depends on the circumstances herein stated.

is, with respect, unclear. To compound the problem, it is to be noted that the plaintiffs prayed for a declaration to the effect:

> (i) A declaration that the plaintiffs are entitled to be compensated for the demolition of their buildings and/or loss of their proprietary interests in their dive resorts on Sipadan Island and/or the loss or breach of their legitimate expectations as pleaded hereof;

[16] Thus the declaration prayed for and the nature of the legitimate expectation claimed relates to the statement of claim ('… as pleaded hereof'), which we have observed earlier to be vague. Yet, the order of the learned High

Court judge did not grant any declaration. The first paragraph of the sealed order merely makes an order for the assessment of damages in the following terms:

> (2) Damages to be assessed by the Registrar for breach of legitimate expectation — i.e. failure to give reasonable notice to wind down the business of the 1st, 2nd, 4th, and 5th Plaintiffs;

[17] Remarkably, no reason is given as to why the declaration sought for was not granted. But it is curious to note that, in seeking for a declaration, the respondents did not make the Federal Government also as a party to the action in spite of the deep involvement of the Biro Keselamatan Negara ('BKN'), an agency of the fFderal Government, as disclosed by the statement of agreed facts and the evidence; and in spite of the fact that it is the respondents' own witness (Encik Suhaili bin Riman ('PW5') the District Officer of Semporna at the material time) who testified that it was the BKN who had demolished the respondents' buildings and structures for security reasons considering the status of the island as a protected area under the Protected Areas and Protected Places Act 1959; and that his office was not involved in the demolishing act.

[18] Even so, it is to be observed that the nature of the 'legitimate expectation' referred to in the 'assessment' order ('failure to give reasonable notice to wind down the business …') is not something that was pleaded for in the statement of claim. Nowhere in para 14 of the statement of claim is it pleaded by the respondents that there is a legitimate expectation on their part to be given 'reasonable notice to wind down the business'. To further add to the problem, the nature of the 'legitimate expectation' in the 'assessment' order is also not supported by the grounds of judgment (in particular, if we were to read paras 30 and 32) or by the facts of the case. To reiterate, in the order, the legitimate expectation is stated to be in the nature of a (to repeat as to what has been said):

> — failure to give reasonable notice to wind down the business of the 1st, 2nd, 4th, and 5th Plaintiffs;

[19] Yet, in the grounds of judgment, the learned trial judge merely states (towards the end of para 32 of the grounds):

> As there is now a change of policy, the plaintiffs are entitled to be paid reasonable compensation or damage[s](sic) by the defendant. This amount shall be measured by determining the length of time for the plaintiffs to wind down their businesses for Pulau Sipadan. That length of period and damage shall be determined by the registrar.

[20] When the learned trial judge uses the words 'for the plaintiffs to wind

down their businesses for Pulau Sipadan' it does not appear to us that here he was using these words in the context of discussing the issue of legitimate expectation. Here he is already embarking in discussing the manner of assessing damages.

[21] In any case, in our judgment, the respondents' reliance on the principles of acquiescence and legitimate expectation to found a cause of action against the Sabah State Government is misconceived as the land in question is state land and that the whole of the Sipadan Island has since 1933, vide *Gazette* Notification No 69/1933, been reserved for public purpose as a bird sanctuary pursuant to s 28 of the Sabah Land Ordinance; and this remains so till today. Therefore, strictly, the plaintiffs had no right to be on the island except in accordance with the Sabah Land Ordinance; but, clearly, their presence on the island was not in accordance with the said Ordinance.

[22] In other words, they were in occupation of the island illegally. Strictly, they were illegally trespassing on state land. Therefore, they could not claim to have any interest on the island; for any claim to any proprietary interest on the island (however, slender the interest is) must be in accordance with the provisions of the Sabah Land Ordinance.

[23] Putting aside for the moment the issue of native lands, occupation of state land under the Sabah Land Ordinance can only be by way of alienation pursuant to s 9 of the said Ordinance, or by way of a Temporary Occupation Licences ('TOL') under s 18, or by way of leases under s 48 (for country lands) of the Ordinance. But in the present case we, instead, note that the learned High Court judge in his grounds of judgment said (at para 32):

> Furthermore, as I have said earlier the plaintiffs who had operated on Pulau Sipadan had obtained economic benefits from it and their operation was conducted at best on a *license impliedly given* by the defendant. (Emphasis added.)

[24] With respect, the Sabah Land Ordinance via s 18 only provides for a Temporary Occupation Licence (TOL). The plaintiffs had never applied for any TOL; indeed, they had never been issued with any; although they had been on the island since the 1990s. On our part, we are not prepared to read into the Sabah Land Ordinance any principle of acquiescence or principle of implied licence by conduct of the State Government of Sabah. We take the position that to do so would be creating a dangerous precedent. There will be administrative and legal chaos in land administration in the state if we were to allow such principles or doctrines to exist side by side with the statutory provisions of the Land Ordinance, when dealing with state land (again, we remind ourselves here that we are at the moment not dealing with natives' claim to customary rights to native lands). We take the view that, just like everyone else, the State

Government of Sabah in dealing with state land must conduct its affairs in accordance within the framework, principles and provisions of the Sabah Land Ordinance. There must be no exceptions, no matter with whom the state government was dealing with. Other than exceptions made, perhaps, in the case of emergency situations or force majeure, when common sense dictates that the strict operation of the Land Ordinance may be suspended in such circumstances, in normal times the state government must not condone any unlawful occupation by any private entity even if its activity was for economic reason (to attract tourism to the State of Sabah) or for political purpose (such as in the case of Malaysia's claim to the Island of Sipadan before the International Court of Justice in Malaysia's territorial dispute over the island with Indonesia). The respondents cannot claim to any 'legal immunity' or to any proprietary right or interest regarding their unlawful conduct on the island vis a vis the Sabah Land Ordinance just because their activities on the island were condoned by the State Government of Sabah, and tolerated by the collector. What is unlawful under the Sabah Land Ordinance remains unlawful, regardless. And the respondents knew or should have known of this (in any case the respondents have never claimed to be ignorant of the Sabah land laws). In our judgment, the plaintiffs have not come to court seeking equitable remedy with clean hands. All along the respondents knew or should have known that the land administrator of the state (that is to say, the collector) had tolerated their presence on the island because the state government (who is supposed to be the custodian of state land by virtue of s 5 of the Sabah Land Ordinance) had unlawfully compromised the provisions of the Sabah Land Ordinance. The collector, the State Government of Sabah and the plaintiffs are all under a legal and moral duty to uphold the law; all the more so with regard to the state government and the collector, the guardians of the law and the custodians of state land. But to be fair to the State Government of Sabah, it and BKN had been giving notices to the respondents to vacate since 24 September 2003. So, assuming that it can be said that there had been an implied licence given to the respondents by the State Government of Sabah to occupy Sipadan Island to carry out diving activities, that implied licence had been revoked as early as 24 September 2003.

[25] It follows then that the principle of acquiescence as enunciated in *Alfred Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor* [1989] 2 MLJ 202 (referred to by the learned judge in his grounds of judgment, and which applied the English cases of *Glasson v Fuller* [1922] SASR 148 and *De Bussche v Alt* (1878) Ch D 286) is of no relevance in the context of our case because in the present case we are not discussing the exercise of private rights of individuals but the statutory powers and duties of public authorities (the collector, the State Government of Sabah and the BKN).

[26] In our judgment, for the sake of completeness, we would also briefly

touch on the unreported case of *Haji Abdillah bin Haji Abdul Hamid v ACLR of Semporna and the State Government* (T21–58– 2006), as this case was referred to by the learned trial judge in his grounds of judgment. With respect, we fail to see the relevance of this case, as this case cited deals with native customary rights of the plaintiff there to collect turtle eggs on Pulau Sipadan; whereas in our case we have made it clear that our case does not concern native customary rights at all.

[27] Finally, there is the issue of reasonable notice. In our judgment, since the respondents knew or ought to have known that their presence on the island was illegal, they were not entitled to reasonable notice. Even if they were entitled to reasonable notice, in determining what is reasonable or otherwise, this must be judged in the light of the fact that they were illegal trespassers, and that the island apart from being declared under the Land Ordinance as a bird sanctuary was also a protected area under the Protected Areas and Protected Places Act 1959, and it is the respondents' own evidence (please refer to the evidence of Encik Suhaili bin Riman (PW5), the District Officer of Semporna at the material time) that the party that actually demolished the respondents' buildings and structures for security reasons was the Biro Keselamatan Negara (BKN), an agency of the Federal Government enforcing a Federal Legislation (ie the Protected Areas and Protected Places Act 1959). The respondents were, therefore, not entitled to a length of notice as if they were implied licensees on the island. Thus on the facts of the case the length of notice given to them to demolish the buildings and structures on the Island was more than adequate. But even if we were to assume the respondents to be implied licensees, we are still of the view that, based on the statement of agreed facts, they had been given ample notices both by the collector, the state government and BKN to dismantle their buildings and structures. Various notices to vacate the island had been given to the respondents by the appellant, the collector and BKN since as early as 24 September 2003.

[28] The order of the High Court is, therefore, set aside.

[29] Appeal allowed with agreed costs of RM60,000 for here and below; order of the High Court set aside.

Appeal allowed with costs of RM60,000.

Reported by Kohila Nesan